

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT

Nos. 01-S-1285, 1289, 1287

STATE OF NEW HAMPSHIRE

v.

ROCCO LONGO

Nos. 01-S-1282, 1283, 1284

STATE OF NEW HAMPSHIRE

v.

LISA LONGO

ORDER ON MOTION TO SUPPRESS

The defendants are each charged with two counts of Possession of a Controlled Drug, Marijuana, with Intent to Sell or Dispense, and one count of Controlling Premises where a Controlled Drug, Marijuana, was Illegally Kept or Deposited. See RSA 318-B:26 (Supp. 2001). The defendants move to suppress the physical evidence obtained during an allegedly unlawful search of their residence. Having considered the evidence and the parties' arguments, the Court **GRANTS** the defendants' motion.

Factual Background

The defendants reside at 62 Nashua Road in Pelham, New Hampshire. Their residence is protected by an alarm system, which is monitored by Central Alarm Monitoring in Manchester. At

12:05 p.m. on June 4, 2001, Central Alarm received an alarm signal from the defendants' residence. Following its normal procedure, Central Alarm first telephoned the residence to determine whether the owners were present and whether they had accidentally tripped the alarm. It then attempted to utilize a contact list, again to no avail. Consequently, Central Alarm contacted the Pelham Police Department. The Pelham Police Department dispatched an officer to the residence.

Officer Charles Laponius responded. He testified that he checked the exterior of the residence and found no sign of forced entry, but that the inner of two front doors was slightly ajar. Officer Laponius then called for back up. Detective Michael Pickles arrived shortly thereafter, and met officer Laponius standing outside the front door.

There was testimony that they believed there may have been a suspect, injured persons, or "something amiss" inside and that it was for these reasons that they entered the residence and proceeded to conduct a room-by-room search. As they searched, they eventually came to a closed door in a hallway with a key in the lock. One of the officers opened the door and either saw or smelled marijuana. One or both of the officers then entered the room, which was a closet, and found clear plastic bags containing marijuana and an electronic scale.

The officers testified that they then left the closet, searched the remaining rooms for suspects or other persons and exited the home. They contacted their supervising officer, Sgt.

Fisher, and remained at the residence to keep it secure until a search warrant could be obtained. After obtaining a search warrant, the officers re-entered the residence and seized the marijuana and other evidence.

Discussion

The defendants move to suppress all evidence obtained as a result of an unlawful warrantless search of their home contrary to part I, article 19 of the New Hampshire Constitution and the Fourth Amendment to the United States Constitution. Because the New Hampshire Constitution provides as much protection in this area as its federal counterpart, the Court will not conduct a separate federal analysis. See State v. Ricci, 144 N.H. 241, 243 (1999).

Part I, article 19 provides that "[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." N.H. CONST. pt. I, art. 19. "[W]arrantless police entries are *per se* unreasonable and thus illegal unless made pursuant to judicially created exception." State v. Sawyer, 145 N.H. 704, 706 (2001). The State has the "burden of proving by a preponderance of the evidence that a warrantless search was constitutionally permissible." State v. Theodosopoulos, 119 N.H. 573, 578 (1979), cert. denied, 446 U.S. 983. Further, when the entry is made into an individual's private dwelling, where there exists a strong expectation of privacy and protection from government intrusion, the

requirement of a warrant is particularly stringent. To have it otherwise would be to obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.

State v. Santana, 133 N.H. 798, 803 (1991) (internal quotations and citations omitted). The State relies on an exception to this general rule which permits a warrantless search where officers have probable cause to search combined with exigent circumstances. The State further contends that during the lawful search, the officers found the marijuana in plain view.

A warrantless search is lawful when law enforcement officers have probable cause to search under exigent circumstances. See Theodosopoulos, 119 N.H. at 578. Probable cause to search exists when the officers reasonably believe that the thing or person sought is located in the place to be entered and searched, or that an offense has been or is being committed. See id.; State v. Thorp, 116 N.H. 303, 307 (1976). "The existence of exigent circumstances requires 'a compelling need for immediate official action and a risk that the delay inherent in obtaining a warrant will present a substantial threat of imminent danger to life or public safety.'" State v. Seavey, N.H. slip op. at 3 (December 19, 2001) (quoting Theodosopoulos at 580). In determining whether exigent circumstances exist, the Court considers the totality of the circumstances. See State v. Graca, 142 N.H. 670,

673 (1998). The Court finds that the State has not met its burden of showing that the search was prompted by exigent circumstances.

The Central Alarm record for the day in question displays the time at which the security system was triggered and the locations of each individual security breach. See State's Ex. 1. The Central Alarm record shows that eight-and-one-half minutes elapsed between the time that Central Alarm called the Pelham Police Department at 12:06:27 p.m., and when the officers opened the door of the closet in which the marijuana was found at 12:15:03 p.m.

The State offered testimony that during that time frame the following occurred:

Officer Laponius received the call in his vehicle while on Route 38. He travelled to the Longo residence and parked his cruiser. He observed a car in the Longos' driveway and ran a check on its license plate. After receiving confirmation that it belonged to the Longos, he walked around the entire perimeter of house, examined the exterior of the residence for signs of forced entry and found none. At some point he observed the front door to be slightly ajar. He called for back-up and waited for Det. Pickles to arrive. Upon Det. Pickles arrival, and within the same eight-and-one-half minutes, at least one of the officers drew his weapon. Both officers entered the residence, a split level, through the front door. They perceived barking dogs. They made sure that the barking dogs were secured before they

ascended the stairs and commenced a room-by-room search of the residence. Having secured at least one room, they came to the closet door, observed a key protruding from the lock and ultimately opened it. While it may be possible for this entire sequence of events to have transpired in eight-and-one-half minutes, the Court cannot say that it is more probable than not that it did. See Petition of Preisendorfer, 143 N.H. 50, 54 (1998) (stating that "proof by a preponderance means that evidence, taken as a whole, shows that the fact or cause shown to be proven is more probable than not" (internal quotation and brackets omitted)).

The officers were sequestered during testimony at the suppression hearing. Their testimony conflicted in almost every material respect regarding how the internal search was conducted and the evidence discovered. Regrettably, a credibility issue concerning one of the officers' testimony has been brought to the Court's attention by both the State and the defendants. See Hillsborough Cty. So. Docket No. 01-S-1285, State's Notice (document #13) and Def.'s Mot. to Supplement Record of Suppression Hrg. (document # 14). Notably, there was also testimony that the warrant was brought to the scene and executed at approximately 1:45 p.m. This belies the fact that the warrant was not signed by the magistrate until 2:00 p.m. on the day of the search.

In isolation, none of the forgoing issues is dispositive of

the issues before the Court. The Combination of all, however, prevents the State from meeting its burden of proof. There is little credible evidence before the Court of exigent circumstances which may have otherwise supported a finding that this warrantless entry and search was constitutionally permissible.

The facts presented here differ from those in other cases in which warrantless home searches triggered by security alarms have been upheld. See, e.g., United States v. Tibolt, 72 F.3d 965, 969-71 (1st Cir. 1995), cert. denied 518 U.S. 1020 (1996) (finding a search was constitutionally permissible where officers responded to alarm and, after finding an open window, entered to search for suspects or captive residents, but instead found marijuana growing facility). But cf. State v. Seavey, N.H. slip op. (December 19, 2001) (finding no exigent circumstances where officers reasonably believed that defendant, driver in an automobile accident, was inside apartment and in need of medical assistance, but had no reason to believe there was a substantial threat of imminent danger to her life).

The fact that the officers subsequently obtained a warrant to search the premises is of no consequence. The evidence unlawfully discovered by the police was used as probable cause to obtain the search warrant. The warrant was obtained through an "exploitation of the primary illegality . . . instead of by means sufficiently distinguishable to be purged of the primary taint"

of the illegal search. See State v. Cobb, 143 N.H. 638, 649 (1999). Therefore, the evidence seized is a fruit of the unlawful search of the defendants' residence and inadmissible at trial. Id.

Conclusion

Based on the foregoing, the Court finds and rules that the State has not met its burden of showing the warrantless search was constitutionally permissible. Accordingly, the Court finds the evidence was obtained in violation of part I article 19 of the New Hampshire Constitution, and must be excluded from evidence at trial. Accordingly, the defendant's motion to suppress is **GRANTED**.

So **ORDERED**.

DATE: February 20, 2002

Gary E. Hicks
Presiding Justice